Public Prosecutor v Alcontara

SUPREME COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05-230-92
GUNN CHIT TUAN CJ (MALAYA), EDGAR JOSEPH JR, EUSOFF CHIN, WAN YAHYA AND MOHAMED DZAIDDIN SCJJ
21 AUGUST 1993

Criminal Law *— Dangerous drugs — Trafficking — Definition of cannabis — Testimony of chemist — Whether evidence had sufficiently proved subject matter of the charge was cannabis within the old definition of cannabis — Dangerous Drugs (Amendment) Act 1992 — Dangerous Drugs Act 1952 s 2*

Criminal Law *— Dangerous drugs — Trafficking — Definition of cannabis — Whether the words 'completely' and 'substantially' should be read into the old definition of cannabis — Dangerous Drugs (Amendment) Act 1992 — Dangerous Drugs Act 1952 s 2*

Statutory Interpretation *— Canons of construction — Whether words could be added to section — Whether new definition could be resorted to*

The respondent had been charged with trafficking in cannabis under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). At the close of the prosecution case, the defence submitted that there was no case to answer as the prosecution had failed to prove the subject matter of the charge, namely, that: (i) the prosecution had failed to prove the plant material in question was cannabis within the meaning of s 2 of the Act, which, at that time, was defined as 'any part of any plant of the genus Cannabis from which the resin had not been extracted, by whatever name it may be designated' ('the old definition'); and (ii) the words 'completely' and 'subtantially' should not be read into the old definition, so that resin from the plant material need not have been completely or subtantially extracted for it to fall outside the old definition, nevertheless the resin in the plant material could have been completely or substantially extracted, since the government chemist's analysis did not establish that the resin had not been completely or substantially extracted from it. The defence also contended that the new definition of cannabis in the Dangerous Drugs (Amendment) Act 1992 reinforced the conclusion that the previous definition implied that the resin need not have been completely extracted.

The trial judge held that there was no case to answer because, at the close of the prosecution case, the prosecution had not established that the plant material was cannabis within the old definition. [See [1993] 1 MLJ 140.] The public prosecutor appealed on the ground that the trial judge's finding was contrary to the evidence and also invited the court to revisit its decision in *Loo Keck Leong v PP*[1] where it was held that, in order for the plant material to fall outside the old definition, the resin must have been substantially extracted.

Held, allowing the appeal and calling upon the respondent to enter his defence:

(1) Having regard to the testimony of the chemist, the finding of the trial judge that, even on the sum total of the evidence, the chemist did not and could not say that the samples he had tested were plant material from which cannabis resin had not been extracted, flew in the face of the evidence and was unsustainable. The prosecution had adduced more than sufficient evidence to establish that the subject matter of the charge was 'cannabis' within the old definition. The testimony of the chemist had sufficiently proved that the subject matter of the charge was cannabis as defined, although it was open to rebuttal by contrary evidence to be adduced by the defence.

(2) While it is true that the old definition of 'cannabis' in the context of its resin content did not use the word 'substantial', in an appropriate case, the court is entitled to articulate an implied meaning, provided it does not rewrite the section.

(3) Adding words to a statute was a legitimate form of statutory interpretation, but one which should be approached with considerable caution. Where a previous decision of the court assists in understanding the change made to the old definition of cannabis, in the context of its resin content, it is permissible to look at the alteration of that definition in s 2 of the Dangerous Drugs (Amendment) Act 1992.

Per curiam:

(1) It was manifestly clear that what the court in *Loo Keck Leong v PP*[1] was driving at was that any part of the plant of the genus cannabis from which the resin has been completely or so substantially extracted as to leave behind only an insignificant trace in the plant material, would be reduced to a harmless substance, and so excluded by the old definition of cannabis.

(2) The onus was on the prosecution to prove that the cannabis resin had not been extracted from the plant material concerned and this it could do by establishing either: (a) that the resin content in the plant material was wholly intact; or (b) that the cannabis resin which remained in the plant material after extraction was not so minute as to amount in reality and common sense to nothing at all and therefore harmless.

(3) There is a presumption that, at the time Parliament enacted an Act, it had an up-to-date knowledge of the relevant cases, so that if, after a provision in an Act of Parliament had been construed by a superior court, Parliament enacted legislation which included that same provision, there is a presumption that Parliament knew of the decision and intended the new legislation to have the same meaning the court had assigned to that provision. On the other hand, the reverse is that when Parliament had legislated to change

what the court had decided, it was an irresistible conclusion that the amendment was designed to meet the decision and render it inoperable.

(4) The approach adopted by the Supreme Court in *Loo Keck Leong v PP*[1] in construing the old definition of 'cannabis' was a purposive one with an application of the maxim de minimis non curat lex — the law does not take notice of trifles.

(5) In arriving at its decision in *Loo Keck Leong v PP*,[1] the Supreme Court was guided by the mischief rule. It was of the view that the case fell outside the mischief at which the definition was aimed, since the amount of cannabis might well have been too minute to amount to something or to be usable.

(6) In deciding which opposing constructions of a statute is likely to lead to its true legal meaning, the court pays due regard to the likely consequences of adopting either construction, ie by testing that meaning against the practical outcome of giving effect to it. Having considered the case of *Loo Keck Leong v PP*,[1] there was no reason to depart from the purposive approach adopted by the court when considering the old definition of cannabis, in the context of its resin content.

[Bahasa Malaysia summary

Responden telah dituduh mengedar ganja di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta itu'). Pada penutup kes pihak pendakwa, pihak pembela telah menghujahkan bahawa tidak ada kes untuk dijawab kerana pihak pendakwa telah gagal membuktikan perkara tuduhan itu, iaitu: (i) pendakwa gagal membuktikan bahawa bahan tumbuhan berkenaan adalah ganja mengikut maksud s 2 Akta itu, yang pada masa itu ditakrifkan sebagai 'any part of any plant of the genus Cannabis from which the resin had not been extracted, by whatever name it may be designated' ('definisi lama'); dan (ii) perkataan 'sepenuhnya' ('completely') dan 'sebahagian besarnya' ('substantially') tidak patut dibacakan ke dalam definisi lama, jadi resin daripada bahan tumbuhan itu tidak perlu diekstrakkan sepenuhnya atau sebahagian besarnya sebelum bahan itu jatuh di luar definisi lama, walaubagaimanapun, resin di dalam bahan tumbuhan itu mungkin telah diekstrakkan sepenuhnya kerana keterangan yang diberikan oleh ahli kimia kerajaan tidak menunjukkan bahawa kesemua atau sebahagian besar resin tidak diekstrakkan daripadanya. Pihak pembela juga menghujahkan bahawa definisi baru ganja di dalam Akta (Pindaan) Dadah Berbahaya 1992 menguatkan lagi pendapat bahawa definisi lama itu membayangkan bahawa resin itu tidak perlu diekstrakkan sepenuhnya.

Hakim perbicaraan telah memutuskan bahawa tidak ada kes untuk dijawab kerana, pada penutup kes pihak pendakwa, pihak pendakwa telah gagal membuktikan bahawa bahan tumbuhan itu adalah ganja menurut definisi lama. [Lihat [1993] 1 MLJ 140.] Pendakwa raya telah membuat rayuan atas alasan bahawa keputusan hakim perbicaraan

bertentangan dengan keterangan dan juga menjemput mahkamah untuk meninjau semula keputusannya di dalam kes *Loo Keck Leong v PP*[1] di mana telah diputuskan bahawa untuk sesuatu bahan tumbuhan jatuh di luar definisi lama, sebahagian besar daripada resin mesti telah diekstrakkan daripadanya.

Diputuskan, membenarkan rayuan itu dan memanggil responden memasukkan pembelaannya:

(1) Merujuk kepada testimoni ahli kimia itu, pendapat hakim perbicaraan bahawa walaupun pada keseluruhan keterangan, ahli kimia itu tidak dan tidak dapat menyatakan bahawa sampel yang diuji olehnya adalah bahan tumbuhan dari mana resin ganja tidak diekstrakkan, adalah bertentangan dengan keterangan dan tidak boleh dipertahankan. Pihak pendakwa telah mengemukakan keterangan yang lebih daripada mencukupi untuk menunjukkan bahawa perkara tuduhan itu adalah 'ganja' mengikut definisi lama. Testimoni ahli kimia itu telah membuktikan dengan secukupnya bahawa perkara tuduhan itu adalah ganja seperti yang ditakrifkan, walaupun ia mungkin dipatahkan oleh keterangan bertentangan yang dikemukakan oleh pihak pembela.

(2) Sungguhpun benar bahawa definisi lama 'ganja' dalam konteks kandungan resinnya tidak menggunakan perkataan 'sebahagian besar', dalam kes yang sesuai, mahkamah berhak menjelaskan makna yang tersirat, asalnya ia tidak menggubah semula seksyen itu.

(3) Penambahan perkataan kepada sesuatu statut merupakan suatu bentuk penafsiran statut yang sah, tetapi ia mesti digunakan secara berhati-hati. Di mana suatu keputusan mahkamah yang terdahulu menolong dalam pemahaman perubahan yang dibuat kepada definisi lama ganja dalam konteks kandungan resinnya, rujukan kepada pindaan definisi itu di bawah s 2 Akta (Pindaan) Dadah Berbahaya 1992 dibenarkan.

Per curiam:

(1) Memanglah jelas bahawa apa yang dimaksudkan oleh mahkamah di dalam kes *Loo Keck Leong v PP*[1] ialah bahawa mana-mana bahagian tumbuhan genus ganja dari mana kesemua atau sebahagian besar daripada resinnya telah dikeluarkan untuk meninggalkan kesan yang kecil di dalam bahan tumbuhan itu, akan menjadi bahan yang tidak merbahaya dan oleh itu tidak termasuk dalam definisi lama ganja.

(2) Beban untuk membuktikan bahawa resin ganja tidak diekstrakkan daripada bahan tumbuhan yang berkenaan terletak pada pihak pendakwa dan ini boleh dibuktikan dengan menunjukkan bahawa: (a) kandungan resin di dalam bahan tumbuhan itu masih hadir sepenuhnya; atau (b) resin ganja yang tinggal di dalam bahan tumbuhan selepas pengekstrakan bukanlah begitu sedikit sehingga

pada hakikatnya dan mengikut akal budi, ia tidak merupakan apa-apa dan adalah tidak berbahaya. A

(3) Terdapat suatu anggapan bahawa, pada masa Parlimen menggubal suatu Akta, ia mempunyai pengetahuan yang terbaru mengenai kes relevan, jadi jika selepas suatu peruntukan di dalam sesuatu Akta Parlimen telah ditafsirkan oleh mahkamah atasan, Parlimen memperbuat perundangan yang termasuk peruntukan yang sama, anggapannya ialah bahawa Parlimen tahu akan keputusan itu dan bertujuan supaya perundangan baru itu mempunyai makna yang sama dengan makna yang diberikan oleh mahkamah kepada peruntukan itu. Sebaliknya, apabila Parlimen menggubal undang-undang untuk menukar apa yang telah diputuskan oleh mahkamah, adalah keputusan yang tidak dapat dibendung bahawa pindaan itu bertujuan menukar keputusan itu dan menjadikannya tidak beroperasi lagi. B C

(4) Pendekatan yang digunakan oleh Mahkamah Agung di dalam kes *Loo Keck Leong v PP*[1] dalam mentafsirkan definisi lama 'ganja' adalah 'purposive' dengan penggunaan pepatah de minimis non curat lex — undang-undang tidak mempedulikan perkara yang remeh. D

(5) Dalam mencapai keputusannya di dalam kes *Loo Keck Leong v PP*,[1] Mahkamah Agung telah dipandu oleh rukun elak mudarat. Ia berpendapat bahawa kes itu jatuh di luar khianat yang peruntukan itu ditujukan kepada, oleh kerana jumlah ganja yang berkenaan mungkin begitu sedikit sehingga tidak merupakan apa-apa atau tidak boleh digunakan. E

(6) Dalam memutuskan yang mana satu penafsiran statut bertentangan yang mungkin membawa kepada maksudnya yang benar di sisi undang-undang, mahkamah mengambil kira akibat menerima-pakai mana-mana tafsiran, iaitu dengan menguji maksud itu berbanding dengan akibat praktik jika maksud itu diterima-pakai. Selepas mempertimbangkan kes *Loo Keck Leong v PP*,[1] tidak ada sebab untuk menyimpang daripada pendekatan 'purposive' yang diterima-pakai oleh mahkamah apabila mempertimbangkan definisi lama ganja, dalam konteks kandungan resinnya.] F G

Notes

For a case on the definition of cannabis, see 4 *Mallal's Digest* (4th Ed) para 26. H

For cases on canons of construction, see 11 *Mallal's Digest* (4th Ed) paras 1286–1302.

Cases referred to

1 *Loo Keck Leong v PP* [1992] 2 MLJ 177 (refd) I

2 *Richardson v Bardenhagen Enterprise Pty Ltd* [1971] Tas SR 307 (refd)

3 *R v Curran & Torney* [1983] 2 VR 133 (refd)

4 *Bakker v Stewart* [1980] VR 17 (refd)
5 *Ganke v Deputy Commissioner of Taxation of the Commonwealth of Australia* (1975) 25 FLR 98; [1975] 1 NSWLR 252 (refd)
6 *Baulkham Hills Shire Council v O'Donnell* (1987) 63 LGRA 7 (refd)
7 *R v Schildkamp* [1971] AC 1; [1969] 3 All ER 1640; [1970] 2 WLR 279 (refd)
8 *R v Westminister (City) London Borough Council Rent Officer, ex p Rendall* [1973] QB 959; [1973] 3 All ER 119; [1973] 3 WLR 109 (refd)
9 *Horsburgh v Steel* (1972) 3 SASR 179 (SA SC) (refd)
10 *Peter Page Pty Ltd v Lawson* (1977) 15 SASR 322 (SA SC) (refd)
11 *Westminister City Council v Haymarket Publishing Ltd* [1981] 1 WLR 677; [1981] 2 All ER 555 (refd)
12 *Regional Assessment Commissioner v Caisse Populaire de Hearst Limitee* (1983) 21 MPLR 9 (Can SC) (refd)
13 *Fell v Yale (No 2)* [1974] VR 134 (refd)
14 *Anderton v Ryan* [1985] AC 567; [1985] 2 All ER 355; [1985] 2 WLR 968 (refd)
15 *R v Worsell* [1969] 2 All ER 1183; [1970] 1 WLR 111 (refd)
16 *R v Graham* [1969] 2 All ER 1181; [1970] 1 WLR 113 (refd)
17 *Bocking v Roberts* [1974] QB 307; [1973] 3 All ER 962; [1973] 3 WLR 465 (refd)
18 *R v Colyer* [1974] Crim LR 243 (refd)
19 *R v Hierowski* [1978] Crim LR 563 (refd)
20 *Bayliss v Oliver* [1978] Crim LR 361 (refd)
21 *R v Carver* [1978] QB 472; [1978] 3 All ER 60; [1978] 1 WLR 925 (refd)
22 *R v Boyesen* [1980] 72 Cr App R 43; [1982] AC 768 (refd)
23 *Keane v Gallacher* [1980] JC 77 (refd)
24 *Ingham v Hie Lie* [1912] 15 CLR 267 (refd)
25 *R v Committee of Lloyd's, ex p Moran* [1983] *The Times*, 24 June 1983 (folld)

Legislation referred to
Dangerous Drugs Act 1952 s 2
Dangerous Drugs (Amendment) Act 1992 s 2

Appeal from: Criminal Trial No 47(58)–39–88 (High Court, Penang)

Dato' Stanley Isaac (Head of Prosecution Division) for the appellant.
Karpal Singh (*Gurbachan Singh* with him) (*Karpal Singh & Co*) for the respondent.

Cur Adv Vult

Edgar Joseph Jr SCJ (delivering the judgment of the court): The respondent to this appeal was prosecuted in the High Court in Penang upon a charge

that he did, on 11 August 1987, at about 5.30am at Jambatan Permatang Tok Labu, Kepala Batas, Seberang Perai, in the District of Butterworth, in the state of Penang, traffick in a dangerous drug, to wit, 70,952.1gm of cannabis, in contravention of s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'), and was acquitted thereof at the close of the case for the prosecution.

Against that order of acquittal and discharge, the public prosecutor has now appealed.

In the court below, at the close of the case for the prosecution, learned counsel for the respondent, Encik Karpal Singh (who also appeared before us), had submitted that there was no case to answer on the ground that the prosecution had failed to prove a fundamental ingredient of the charge; namely, that the plant material recovered from the boot of a motor car bearing registration no WBE 2789, which the respondent was driving at the material time, was cannabis within the meaning of s 2 of the Act.

It was pointed out that at the material time, 'cannabis' was defined by s 2 of the Act to mean 'any part of any plant of the genus Cannabis from which the resin has not been extracted, by whatever name it may be designated' ('the old definition'). But, subsequently, with effect from 4 September 1992, cannabis had been redefined by Act A334, that is to say, the Dangerous Drugs (Amendment) Act 1992, to mean 'any part of any plant of the genus Cannabis from which there is found to be present resin *irrespective of its quantity*, and by whatever name the plant may be designated' ('the new definition') (emphasis added). However, the new definition was neither expressed to be retrospective nor was it procedural.

It was further argued that the phrase 'resin has not been extracted' in the old definition of 'cannabis', must mean 'not been completely extracted', nor should one read into the definition the word 'substantially' and, to that extent, the Supreme Court case of *Loo Keck Leong v PP*[1] was wrongly decided. To emphasize this point, counsel argued that the very fact that 'cannabis' had been redefined reinforced that conclusion.

In any event, it was argued that the result of the government chemist's analysis of the plant material concerned, did not establish that resin had not been completely or substantially extracted from the plant material concerned. It was said that this was so because the chemist had not been able to certify what the original content of resin in the plant material was, as the amount of resin then would depend on unknown factors such as the country of origin of the plant material and its heredity.

In reply, the learned deputy public prosecutor had submitted that the new definition of cannabis was a 'catch all provision'; and had no bearing in construing the old definition of cannabis.

He drew attention to the fact that, unlike the testimony of the chemist in *Loo*'s case,[1] the chemist in the present case had categorically stated that the resin had not been either completely or substantially extracted. In this context, he argued that the word 'extract' must imply a deliberate extraction and not include accidental extraction, as for example, resin falling or dropping off in the course of handling.

A The trial judge (Vincent Ng JC) held that there was no case to meet because, at the close of the case for the prosecution, an essential ingredient of the charge, to wit, that the plant material seized was cannabis within the old definition had not been established by the prosecution.

In arriving at that conclusion, the judge made the preliminary observation B that the chemist had admitted that, before entering the witness box, his attention had been drawn to the decision in *Loo*[1] wherein the Supreme Court (at p 181) had explained the significance of the old definition of cannabis in the context of its resin content not having been extracted; more particularly, it had explained, 'that the non-extraction of resin from any part of the plant of the genus Cannabis is an ingredient of the charge of C trafficking in cannabis'.

And, at p 181, the point was taken further thuswise:

> The fairer interpretation of the definition clause in this aspect ought to be that the resin should not have been substantially extracted (but not necessarily without a trace in the residue) and not necessarily that the same should have D been completely extracted so that the plant material in any particular case for all practical purposes ceases to amount to such a dangerous drug — a harmless substance. In view of the evidence of the chemist, we feel that the benefit of doubt as to whether the resin had been so substantially extracted ought to be given to the appellant.

E Next, touching on the impression the chemist made upon him while testifying, the judge thought that he was 'a chemist testifying under siege, who was unduly and overly eager to dovetail his purported test-finding with the decision in *Loo*'s case.

And, in another passage in his judgment [at p 145], the judge touched on the manner the chemist gave his evidence and embarked upon an analysis F of that evidence, in these terms:

> The cagey and hesitant manner in which PW1 had given his evidence and his answers under cross-examination gave me the impression of a witness who had made a brave attempt to be wise after the event in respect of tests which he carried out about 4½ years before the decision in *Loo*'s case; the precise findings on which tests he now tries to relate from memory. He said that there are two G ways of extraction of resin, being:
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> (a) by mechanical means; whereby the plant material is thrashed against a hard object, and this method being deliberate, would have destroyed the plant structure whereas he observed that the plant structures were still intact. Yet, he had also admitted that light thrashing of the plant material would remove H some resin and such light thrashing would not change the physical integrity of the plant structure; and
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> (b) by chemical solvents; whereby the resins would have been completely or substantially removed from the plant material, but as his tests showed that the resins were still present in abundance, he concluded that no extraction by organic solvent had been carried out on the plant exhibit. Yet, he had also I said that if the solvents had been used on the plant material for the extraction of resin, all his above tests would not show the presence of the solvent and he did not carry out any quantitative tests on the resin present inside and outside the plant material he examined. It would seem strange and incredible

that he had, at that material time, looked for the abundance of resin in the plant material he examined when such a factor was then quite irrelevant to him as a chemist. As there were no colour charts to guide him in his thin layer chromatography test, the abundance of resin he claimed to have found by way of colour tone seen could, at the very most, only be his subjective opinion. Furthermore, considering the passage of time since his tests, it is remarkable that he made no reference to any working notes or entries in his papers to confirm his purported test-finding on this currently vital issue of the quantitative presence of cannabis resin; the ingredient 'being a matter of science and not being a question of ordinary fact normally perceivable by the senses ...'. (See the decision in *Loo*'s case.)

The judge then went on to say this [at p 146]:

> Even on the sum total of his evidence, he did not and could not say that, from the samples he tested, P3–P10 were plant material from which cannabis resin had not been extracted. At the highest watermark of his evidence, he only said that they were plant material from which resin had 'not been completely or substantially extracted'.
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> When questioned by the court as to how he could conclude that there was no substantial extraction of the resin when he was totally without a clue as to how much cannabis resin was extractable from the samples he took from P3–P10, bearing in mind that he had not done any quantitative tests for the presence of cannabis resin in such samples, he was unable to give any satisfactory explanation.

And, in his summary of conclusions, towards the end of his judgment, the judge said this [at p 147–148]:

> ... I am of the view that the recent amendment makes for good practical sense, despite its critics, as it avoided the use of the word 'substantial' in the amended definition. It may be permissible to speak of a substantial fortune, a substantial meal or a substantial man, but is it permissible to speak of a substantial presence of cannabis resin, the ingredient being a matter of science?
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> As such, I hold that:
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> (a) as PW1 could not positively say that the plant samples he had taken from P3–P10 and examined by him, was plant material from which 'cannabis resin had not been extracted', as defined under the governing definition; and
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> (b) his opinion that there was 'no substantial extraction' of cannabis resin as expressed in his evidence, even if accepted by me (which I do not), is not sustainable and is devoid of any rational, scientific or semantical basis; nor is it based on the results of any or any proper analysis by him on the presence of cannabis resin in the samples taken from P3–P10;
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> the essential ingredient of the charge that the plant material seized was cannabis as defined under the governing definition in s 2 of the Act has not been made out by the prosecution at the end of the prosecution case.

Before us, the acquittal of the respondent has been attacked by the learned deputy public prosecutor on a number of grounds but the cumulative effect of these can compendiously be put in a single sentence, namely, that the finding of the judge that the chemist could not positively say that the plant samples examined by him was cannabis within the old definition of cannabis was contrary to the evidence.

A It behoves us, therefore, to examine the testimony of the chemist with a fine-tooth comb and this we now proceed to do.

According to the evidence of the chemist, he had carried out the following four tests on the plant material submitted to him:

(1) a physical examination of the plant material with the naked eye, as a B result of which he observed that the plant material was all of the same type and physical features as that of cannabis;

(2) a microscopic examination of the plant material, as a result of which he observed an abundance of sticky resin and morphological and microscopic features characteristic of cannabis;

C (3) a Duquenois Levine test, which gave a strong positive colour, indicating that the plant material was cannabis with a high concentration of resin; and

(4) a thin layer chromatography test ('TLC test'), the result of which was that the samples showed positive spots confirming that the plant material was cannabis with a high concentration of resin.

D We note that the chemist had concluded that 'with the combination of all the four tests and not by individual tests alone, I concluded that the plant material was cannabis where resin had not been extracted'.

Elaborating on how he carried out the four tests aforesaid, he said that the entire subject matter of the charge had been enclosed in eight packages E by the police, the contents of each of these had been examined by him and that he took 20 random samples for tests 2, 3 and 4 from each of these packages. As a result, he concluded as follows:

> ... package A contained 9,725.5gm of cannabis. I examined package B and did the same as I did with package A and, upon getting the same positive results, I F found package B contained 10,004.9gm of dried plant material which, on analysis, I found to be cannabis.
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> I conducted the same tests and weighing for the rest of the packages C–H and, upon getting the same positive results, I found in C, a package containing 9,677gm of cannabis. In package D, I found 6,267.2gm of cannabis. In package E, I found 8,047.8gm of cannabis. In package F, I found 9,756.4gm of cannabis. G In package G, I found 9,763.3gm of cannabis. In package H, I found 7,710gm of cannabis. All the eight packages were wrapped in large plastic packets of varying layers. The cannabis mentioned by me above is as defined in the Act.

As to the question whether there was evidence of non-extraction of resin from the plant material, we note that the chemist had said that, from the H samples taken and tested, he concluded that solvent had not been used to extract resin though he did not know the original amount of resin in a given quantity of plant material. However, he noticed that the presence of resin in the plant material he examined was 'abundant and substantial'.

And, giving further reasons for concluding that resin had not been extracted or not been substantially extracted from the plant material he had I examined, he added this:

> I did not separate the resin from the plant material to determine how much of the resin was in the sample of the plant material I examined. The extractable amount

> of resin in a given quantity of cannabis plant material would depend on the geographical origin of the plant material. The resin recoverable varies widely. I am unable to determine the geographical origin of the plant material in this case. I do not know how much of resin was originally there. To me extraction of resin means complete or substantial [extraction] and since the resin was present in substantial amount I say that there was no extraction. To me substantial extraction means after extraction it would only leave trace amounts of resin in the plant material. From this reasoning, I say that there was no substantial extraction.

In our view, having regard to the testimony of the chemist, which we have highlighted and discussed, the finding of the judge that 'even on the sum total of his evidence, the chemist did not, and could not say that, from the samples he had tested, P3–P10, were plant material from which cannabis resin had not been extracted' flies in the face of the evidence, and so is unsustainable.

Similarly, the finding of the judge that the opinion of the chemist that there was 'no substantial extraction of cannabis resin ... is not sustainable and is devoid of any rational, scientific or semantic basis nor is it based on the results of any or any proper analysis by him', suffers from the same defect.

We would add that, in all fairness to the chemist, the strictures passed by the judge against him cannot be justified. The chemist was, after all, a professional man, with no axe to grind and whose sole desire was to assist the court, in arriving at a just decision in the case; in particular, as to whether or not the plant material was 'cannabis' within the meaning of the old definition of cannabis. It is therefore unfortunate that the judge found it necessary to impugn the credibility of this witness, and who, we accordingly find to be a credible and reliable witness.

We would, therefore, hold that the testimony of the chemist in the present case had sufficiently proved that the subject matter of the charge was 'cannabis' within the old definition of cannabis, in the context of its resin content, as explained, though, in appropriate circumstances, it would be open to rebuttal by contrary expert evidence to be adduced by the defence.

That, however, is not the end of the matter. In the course of the argument, the learned deputy public prosecutor invited us 'to revisit' the recent decision of this court in *Loo*;[1] in other words, he was inviting us to re-examine and explain that decision as he implied that there were passages in that judgment (quoted above) relating to the old definition of cannabis, in the context of its resin content, which had given rise to doubt and difficulty.

In view of the fact that there are other drug trafficking trials and appeals pending, which call for a consideration and application of the passages in *Loo*'s case[1] to which we have adverted, we consider that the present appeal provides a suitable opportunity for the re-examination and explanation of that case.

First of all, we would clarify the passages in *Loo*'s case,[1] which we have reproduced above, and then proceed to identify the ratio decidendi for which that case is authority.

A Having regard to the context of the passages in the judgment of *Loo*'s case[1] quoted above, it is manifestly clear that what the court was driving at was that any part of the plant of the genus cannabis from which the resin has been completely or so substantially extracted as to leave behind only an insignificant trace in the plant material, would be reduced to a harmless substance and so excluded by the old definition of cannabis.

B Accordingly, the onus was on the prosecution to prove that the cannabis resin had not been extracted from the plant material concerned and this it could do by establishing either: (a) that the resin content in the plant material was wholly intact; *or* (b) that the cannabis resin which remained in the plant material after extraction was *not* so minute as to amount in reality C and common sense to nothing at all and therefore harmless.

Now, in *Loo*'s case,[1] a difficult and important point of law affecting not just the liberty of the subject but his life, arose for decision; it concerned the old definition of cannabis, in the context of its resin content.

In particular, in *Loo*'s case,[1] the question was whether the old definition had the all-embracing effect for which the prosecution contended, so that D cannabis means any part of the plant of the genus cannabis in which there is found to be present resin, however minute its quantity, in which event, even the presence of an insignificant trace would suffice to come within the definition, or whether cannabis should have a more limited interpretation for which the defence contended, so that the onus was upon the prosecution E to establish not just that the plant contained *some* cannabis resin, however minute, but which is large enough to be used in a manner prohibited by the Act.

In the event, the court concluded unanimously that the Act, being highly penal, the contention of the prosecution was untenable. In other words, in construing the old definition of cannabis, in the context of its resin content, F the court was, in substance, declaring or making explicit certain of its implicit or implied provisions.

The question for decision regarding this part of the case is whether the court in *Loo*'s case[1] was entitled to resort to such a technique, in construing the old definition of cannabis, in the context of its resin content.

G It is true that the old definition of cannabis, in the context of its resin content, does not use the word 'substantial', but in an appropriate case, the court is entitled to articulate an implied meaning, or in other words, to make express an implied or implicit meaning provided it does not rewrite the section, for it is the plain duty of the judiciary to construe and apply the H section as it stands. We recognize that adding words to a statute is a legitimate form of statutory interpretation, but one which should be approached with considerable caution.

As was well put by Burbury CJ in the full court of Tasmania in *Richardson v Bardenhagen Enterprises Pty Ltd*[2] at p 316:

I > The dividing line between impermissible filling in of legislative gaps and filling out by interpretation of a whole statute, something necessarily implied within its expressed language, is sometimes a fine one. Parliament may, of course, express its intention by necessary implication from the words it uses. This principle may often be called in aid where general statutory powers are given and to give effect

> to the clear legislative purpose, incidental powers will be implied. It has been called in aid to introduce by implication the rules of natural justice ... but what is implied must not conflict with the express language of the statute. It must be within it and incidental to it ... Particularly in a penal statute, the distinction must steadily be borne in mind between something which is by implication part of what is expressed, and something which, by inference, the court concludes the legislature has simply failed to provide for or overlooked ... If, by permissible processes of statutory interpretation, the court cannot say that what is omitted is necessarily implied within the language it cannot legislate by filling in gaps which the legislature has left. That proposition applied with particular force to penal statutes.

Nevertheless, there are numerous cases in which words have been implied in a statute. (See, eg *R v Curran & Torney*[3] at p 146 per McGarvie J (Vic SC); *Bakker v Stewart*,[4] at p 19 per Lush J (Vic SC) (special leave to appeal to the High Court of Australia refused, see p 25 (note)); *Ganke v Deputy Commissioner of Taxation of the Commonwealth of Australia*,[5] at p 101 per Nagle J (NSW CA); *Baulkham Hills Shire Council v O'Donnell*,[6] at p 16 per Bignold J (NSW LEC)).

In this context, a case to which we should like to make more than a passing reference is *R v Schildkamp*,[7] where the point at issue in the House of Lords concerned the meaning of s 323(3) of the Companies Act 1948, a selective comminution of which reads:

(1) where any business of a company is carried on,
(2) with intent to defraud creditors of the company,
(3 every person who was knowingly a party to the carrying on of the business in the manner aforesaid,
(4) [shall be guilty of an offence].

The question for decision by the House of Lords was whether this enactment applied literally or was, by implication arising from its context, confined to the case where the company was in liquidation. The House held by three to two that it was so confined and that the appeal by the prosecution failed.

Another point which arose, during the argument before us, was whether, in construing the old definition of cannabis, in the context of its resin content, it was permissible to look at the new definition.

It was contended by the learned deputy public prosecutor that the new definition of 'cannabis', in the context of its resin content, merely expresses more clearly what was silently implied in the old definition.

On the other hand, it was contended by counsel for the respondent that the new definition of 'cannabis', in the context of its resin content, repairs a gap or omission in the old definition.

There is a presumption that, at the time Parliament enacted the Dangerous Drugs (Amendment) Act 1992, it had an up-to-date knowledge of the relevant cases. (See *R v Westminster (City) London Borough Council Rent Officer ex p Rendall*,[8] at p 966 per Lord Widgery CJ (DC); the Court of Appeal reversed this decision without affecting this principle (at p 975).) And, was also aware how similar words in previous Acts have been construed. (See *Horsburgh v Steel*,[9] at p 185; *Peter Page Pty Ltd v Lawson*[10] at p 324

A (both South African Supreme Court decisions); *Westminster City Council v Haymarket Publishing Ltd*,[11] at pp 681–682 per Oliver J (later, Lord Oliver of Aylmerton); *Regional Assessment Commissioner v Caisse Populaire de Hearst Limitee*,[12] at p 19 per cur (Canadian Supreme Court).) So, Parliament must be presumed to have known of the decision in *Loo*'s case[1] at the time the Dangerous Drugs (Amendment) Act 1992 was passed.

B If, therefore, after a provision in an Act of Parliament has been construed by a superior court, Parliament enacts legislation which includes that same provision, there is a presumption that Parliament knew of the decision and intended the new legislation to have the same meaning the court had assigned to that provision.

C On the other hand, the reverse side of the coin is that when, as in the present case, Parliament has legislated to change what the court had decided in *Loo*'s case[1] was the effect of the then existing state of the law, to wit, the old definition of cannabis, in the context of its resin content, 'it is an irresistible conclusion that the amendment was designed to meet the decision and render it inoperable'. (See *Fell v Vale (No 2)*[13] at p 137.)

D In our view, therefore, the decision in *Loo*'s case does assist in understanding the change that Parliament had made to the definition of the word 'cannabis' when it enacted the Dangerous Drugs (Amendment) Act 1992. It is therefore permissible, when construing the old definition of cannabis, in the context of its resin content, to look at the alteration of that

E definition in s 2 of the Dangerous Drugs (Amendment) Act 1992.

In all the circumstances, we are satisfied that the Supreme Court, in construing the old definition of 'cannabis' in the context of its resin content, in *Loo*'s case,[1] was amply justified in resorting to the judicial technique of declaring or making explicit certain of its implicit or implied provisions. In other words, the court was applying a purposive approach to the construction

F of a penal statute in order to make sense of the statute and its purpose. It is clear that nowadays, generally, the courts do adopt such an approach when construing a penal statute (see, eg Lord Roskill in *Anderton v Ryan*[14] at p 573).

We now turn to consider the crucial part of the judgment of the Supreme

G Court in *Loo*'s case,[1] where it differed from the trial judge who had held that the resin had to be completely extracted before the possession of cannabis ceased to be an offence under the Act on the ground that 'the word "completely" or words to similar effect are not in the definition clause, neither is such a view consistent with the way in which the definition clause ought to be construed, when it affects personal liberty or worse' (at p 181H).

H The judgment concludes by expounding the proper construction of 'cannabis' in the old definition of cannabis, in the context of its resin content and then proceeds to make a reference to the evidence of the chemist and concludes that, upon that evidence, the benefit of the doubt as to whether the resin has been 'so substantially extracted' should be given to

I the accused (at p 181 para I to p 182 para A).

In the United Kingdom, the question whether the possession of microscopic quantities such as drug traces, of a controlled drug, can be unlawful, has given rise to considerable judicial controversy. We now

proceed to consider a number of these cases, none of which were cited to us.

In *R v Worsell*,[15] the accused was convicted for possession of a dangerous drug, to wit, heroin, under reg 9 of the Dangerous Drugs (No 2) Regulations 1964. He was found in possession of a tube which had, at one time, contained heroin but, at the time of his arrest, was apparently empty, though under a microscope it was possible to discern a very few small droplets which could not be measured or poured. He was eventually charged with possessing 'a few droplets of diamorphine'.

It was held that inasmuch as the tube was in reality empty (containing nothing that could be seen, measured, poured, used or sold), it was impossible to hold that there was any evidence that the tube contained a drug at the time of his arrest. Accordingly, the conviction was quashed.

In *Worsell*'s case,[15] it looks very much as though that the court was avoiding a stringent interpretation of reg 9 by adding words in order to give effect to the spirit of the section. It appears to have done so, because it considered that the case fell outside the mischief at which the section was aimed since the quantity was too minute to be administered. This enabled the court to equate minute quantities of the drug with 'nothing'. Had the court adopted a stringent interpretation of reg 9, it could have declared that reg 9 prohibits the possession of 'any' controlled drug, including a trace, however insignificant, minute or slight.

We would also take the opportunity to reiterate that the approach adopted by the Supreme Court in *Loo*'s case,[1] in construing the word 'cannabis' was a purposive approach in line with the approach adopted by the Court of Appeal in *Worsell*.[15]

In *R v Graham*,[16] the accused was prosecuted for being in possession of cannabis resin found in scrappings from the pockets of his clothes in contravention of reg 3 of the Dangerous Drugs (No 2) Regulations 1964. Although the cannabis resin found in the scrappings were very small, they were capable of being measured and weighed. The defence advanced by the accused was that he did not know of the presence of the resin in his pocket and was not truly in possession of it. He was convicted and from that conviction he appealed, on the ground that the quantities were so small as to amount to nothing, having regard to the principles enunciated in *Worsell*.[15]

It was held, dismissing the appeal, that as the quantities of cannabis resin could be weighed and measured, it could not be said that there was no cannabis in his possession.

It would appear that *Worsell*[15] was distinguishable on the ground that, in *Graham*,[16] unlike *Worsell*,[15] the quantity of cannabis was capable of being measured and weighed.

It would also appear that different tests had been proposed in *Worsell*[15] and *Graham*[16] in determining whether possession of microscopic quantities such as drug traces of a controlled drug could be unlawful.

In *Worsell*,[15] Salmon LJ (as he then was) suggested that no offence is committed unless there is a sufficient quantity of the drug to be used in some way. In *Graham*,[16] the judgment speaks of a weighable and measurable quantity.

In *Bocking v Roberts*,[17] the defendant was prosecuted for being in possession of cannabis resin contrary to reg 3 of the Dangerous Drugs (No 2) Regulations 1964, and s 3 of the Dangerous Drugs Act 1965. In the magistrates' court, the accused was convicted and from that conviction he appealed, by way of case stated, on the ground that a trace of cannabis resin which could not be weighed, measured or used was incapable in law of being the subject matter of a charge of possession of a drug under s 13 of the Dangerous Drugs Act 1965.

The Divisional Court (comprising Lord Widgery CJ, Bean J and Mackenna J (dissenting)) held that the de minimis rule was not applicable, though the quantity of drug found must be enough to justify a charge of possessing a drug and not merely enough to indicate possession in the past. In this case the quantity being at least 20 micrograms, was measurable and therefore, the magistrates were entitled to conclude that there was enough cannabis resin to justify the charge. Accordingly, the appeal was dismissed. It is noteworthy that the judgment does not suggest that it was argued that, having regard to the quantity of drugs being so small, it had not been proved that the accused knew of its existence and so there was no proof of possession.

In *R v Colyer*,[18] a prosecution for unlawful possession of traces of cannabis weighing 20 micrograms (one millionth of an ounce) in a pipe, under s 5(1), Stinson J refused to follow *Bocking v Roberts*,[17] it being a decision of the Divisional Court. He held that to say that this amount was 'measurable' after a complicated process of extraction, was stretching the meaning of s 5(1). In any event, he concluded that there was no proof of knowledge and so no proof of possession.

The same result was arrived at by Edmonson J in *R v Hierowski*[19] when he acceded to a submission of no case to answer, in a prosecution for unlawful possession of no less than 20 micrograms detected by a chemical test, on the ground that the amount was, in effect, nothing.

In *Bayliss v Oliver*,[20] the accused persons had been prosecuted for possession of 0.011gm and 0.083gm of cannabis, no evidence having been led by the prosecution as to the usability of the drug. It was held, relying on the test of 'usability' to determine whether a drug amounted to something, enunciated by Salmon LJ (as he then was) in *Worsell*,[15] that there was no evidence that the accused persons were in possession of a usable quantity of the drug, and so they were entitled to an acquittal.

In *R v Carver*,[21] the accused was prosecuted for being in unlawful possession of a roach end (a filter made of cardboard) containing 20 micrograms of cannabis resin and an empty box from which two milligrams of resin was scraped. The Court of Appeal, while endorsing the reasoning in *Bocking v Roberts*,[17] went on to say (per Michael Davies J) this (at p 477):

> ... if the quantity of the drug found is so minute as ... to amount to nothing or ... *if the evidence be that ... it is not usable in any manner which the Misuse of Drugs Act 1971 was intended to prohibit*, then a conviction for being in possession ... would not be justified. (Emphasis added.)

The court here was really going even further than the test propounded by Salmon LJ in *Worsell*[15] because, even if the drug satisfied that test and

amounted to 'something', it must be capable of being used 'in any manner which the Misuse of Drugs Act 1971 was intended to prohibit'. A

Then came the case of *R v Boyesen*,[22] where the accused had been convicted on the second count of an indictment charging him with possession of five milligrams of cannabis resin contained in a polythene bag which, in turn, was contained in a metal tin which he carried. The traces were brown in colour and visible with the naked eye and an expert testified that they could be picked up and put into a pipe or cigarette. He was convicted and against that conviction he appealed. B

The Court of Appeal held, applying *Carver*,[21] that common sense should prevail in deciding whether the quantity of cannabis resin charged was usable for the purpose of charging a contravention of s 5 of the Misuse of Drugs Act 1971, and that, in the instant case, five milligrams was not such a usable quantity. C

The court went on to criticize the prosecuting authorities and the trial judge by adding that it was offensive that the machinery of law should be brought into operation to prosecute a man for allegedly possessing five milligrams of cannabis resin. D

On appeal by the Crown to the House of Lords, the judicial controversy to which we have referred was resolved when the conviction was restored. The House ruled that the 'usability' test propounded in *Carver*[21] was incorrect law, the test being not usability but possession, that the quantity had to be sufficient to enable the court to find, as a fact, that it amounted to something, the question being of fact and common sense of the tribunal (applying *Bocking v Roberts*[17]) and if it were visible, tangible and manipulable, it amounted to something; that the quantity might also be relevant to knowledge, in that it might be so minute that it could not be proved that the accused had known that he had it. On the facts, the House was of the view that the jury had accepted, after a correct direction by the judge as to knowledge, that the accused had known that the traces of brown substance were there and that he had been properly convicted. E F

In so holding, Lord Scarman, speaking for the House of Lords, applied the reasoning of the Lord Justice Clerk Wheatley in the Scottish case of *Keane v Gallacher*[23] when the latter said this (at pp 81–82): G

> The decision in *R v Carver* seems to entail the importation into s 5(1) of a qualification to the term controlled drug; namely, which is capable of being used. If that be the case, it would add an additional onus on the prosecution to prove that fact. If Parliament had intended that such a qualification should be added it would have been simple to give express effect to it. ... It is the possession of the controlled drug which is made punishable by s 5(1) and (2), not its use or potential use. H

We have already observed that the approach adopted by the Supreme Court in the very recent case of *Loo*[1] in construing the old definition of 'cannabis', in the context of its resin content, was a purposive one in line with the approach adopted by the Court of Appeal in *Worsell*[15] and *Carver*.[21] This must be an application of the maxim de minimis non curat lex — the law does not take notice of trifles. I

More particularly, in arriving at its decision in *Loo*,[1] the Supreme Court was guided by the mischief rule; that is to say, it took the view that if the chemist acknowledged that, after extraction of the resin from the plant material (as was the case), it was possible that there might be only an insignificant trace of resin remaining in the plant material, then such plant material would, for all practical purposes, cease to be a dangerous drug, and so excluded from the old definition of cannabis. In other words, the Supreme Court was of the view that the case clearly fell outside the mischief at which the definition was aimed, since the amount of cannabis might well have been too minute to amount to something (see *Worsell*[15]) or to be 'usable' (see *Carver*[21]).

In deciding as it did in *Loo*'s case,[1] the Supreme Court was no doubt fully aware that, on the one hand, the Act was meant to combat a grave social evil and on the other, that the Act was highly penal, attracting as it did the extreme penalty of death in the event of conviction for the offence of drug trafficking. Yet, it chose the common sense approach in expounding the old definition of cannabis, in the context of its resin content. Common sense may show that the ambit of the mischief is narrower than the literal meaning of the remedial enactment, as indeed occurred in the Australian case of *Ingham v Hie Lie*.[24] In that case, a Chinese laundryman had been prosecuted under an Act whose purpose was to limit the hours of work of Chinese in factories, laundries, etc so as to protect other industries. The accused, who had been ironing his own shirt, was held not guilty of an offence that on a literal interpretation of the Act it had created.

So also, in deciding which opposing constructions of a statute is likely to lead to its true legal meaning, the court pays due regard to the likely consequences of adopting either construction. The point was well made by Mustill J (as he then was) in *R v Committee of Lloyd's, ex p Moran*:[26] 'a statute... cannot be interpreted according to its literal meaning without testing that meaning against the practical outcome of giving effect to it'. In other words, courts do not wear blinkers and construe statutes with narrow and legalistic literalness.

Having anxiously and carefully considered the case of *Loo*,[1] we see no reason to depart from the purposive approach adopted by the court when considering the old definition of cannabis, in the context of its resin content.

We would, however, comment on the expression 'substantially extracted' occurring in the passage at p 181 para I of the report on *Loo*'s case[1] (reproduced above). We do not consider that a court will be assisted by laying down any mathematical formula as to what will or will not constitute substantial extraction of resin from the plant material concerned and we do not propose to lay down any such formula. Suffice it to say, that a court in considering whether the prosecution has established that a given sample of plant material complies with the old definition of cannabis, in the context of its resin content, will approach the question in a common sense way and in accordance with the principles which we support and which we have discussed.

So far as this appeal is concerned, we would repeat that the prosecution had adduced more than sufficient evidence to establish that the subject

matter of the charge was 'cannabis' within the old definition, in the context of its resin content, as expounded in *Loo*'s case,[1] which in turn has been re-examined and explained in this judgment.

In the result, the appeal is allowed, the order of acquittal and discharge is set aside, and we substitute, in lieu thereof, an order that the respondent be called to enter upon his defence.

Appeal allowed.

Reported by Prof Ahmad Ibrahim